In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1233

DUVALL MANOR, INCORPORATED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 17) is not reported.

JURISDICTION

The judgment of the Court of Claims (Pet. App. 17) was entered January 24, 1966. The petition for a writ of certiorari was filed on April 19, 1966. The jurdisdiction of this Court is invoked under 28 U.S.C. 1255(1).

218-347—66

QUESTIONS PRESENTED

1. Whether a claim against the United States may be founded on the refusal of the Federal Housing Administration to apply an accumulated replacement reserve against defaults in mortgage payments.

2. Whether such claim is barred by the dismissal with prejudice of a suit to enjoin foreclosure of the mortgage.

STATEMENT

In 1949 the Federal Housing Administration (F.H.A.), acting under the Veterans Emergency Housing program, insured a mortgage which secured a loan by the Equitable Life Insurance Company to the petitioner. As required by F.H.A. regulations (24 C.F.R. (1949 ed.) 280.30(d)), the mortgage provided for monthly payments by petitioner into a fund held by the mortgagee for F.H.A. as a reserve for the replacement of fixtures and structural elements of the real estate.

Petitioner failed to make payments on the loan, and in May 1957 Equitable declared a default. Petitioner then requested F.H.A. to apply the reserve fund to the delinquencies. F.H.A. determined that such release of the reserve would not be to its best interests. Petitioner next filed a suit entitled *Duvall Manor, Inc. v. Equitable Life Insurance Co., Charles S. Phillips, Trustee, Gilbert C. Clark, Trustee, and Norman P. Mason, Federal Housing Commissioner,* Civil Action No. 1441–57, in the United States District Court for District of Columbia, to enjoin the foreclosure of the mortgage. On August 15, 1957, that suit was dismissed with prejudice, and thereafter a foreclosure sale was

held in accordance with the applicable District of Columbia law. At that sale Equitable bid in the property. Thereafter, F.H.A., under its insurance commitments, accepted a conveyance of the property, paying Equitable with F.H.A. bonds. The F.H.A. then advertised for sale and sold the property. The replacement reserve ($10,469.58) was applied to reduce petitioner's remaining liability on the loan.

Petitioner filed this suit in the Court of Claims to recover the amount of the reserve fund and "its equity investment and mortgage principal payments." On cross-motions for summary judgment, the court granted judgment for the United States in a brief order stating the grounds to be (1) the authority of *United States* v. *Pine Hill Apartments, Inc.*, 261 F. 2d 667 (C.A. 5), and *United States* v. *Queen's Court Apartments, Inc.*, 296 F. 2d 534 (C.A. 9), and (2) collateral estoppel by the judgment in *Duvall Manor* v. *Equitable Life, supra.*

ARGUMENT

1. In *Pine Hill, supra,* it was held that F.H.A. had no duty to apply the reserve fund against mortgage payments due so as to prevent a default and foreclosure. Following that decision, *Queen's Court Apartments, supra,* reversed a decision which conditioned foreclosure of a mortgage under the National Housing Act upon return to the mortgagor of the reserve funds. Petitioner ignores these decisions and the nature of the replacement reserve. It is not part

of the mortgage debt, but rather a fund, available to F.H.A., designed to assure a reserve for the replacement of mechanical equipment and structural elements. The 10-year age of petitioner's project (Pet. 9) emphasizes the approaching need for such a fund. To require its application to payment of defaulted installments under the mortgage would result in the dissipation of the reserve for a purpose other than the one for which it was created. Petitioner's assertions concerning national housing policies at various times (Pet. 5–9) have no bearing on the validity of the replacement reserve requirement.[1]

2. Petitioner's present claim is barred, as the Court of Claims correctly held (Pet. App. 17), by the judgment dismissing with prejudice petitioner's suit for an injunction against the Federal Housing Commissioner. In that suit petitioner sought to forestall by injunction the same conduct for which it now seeks

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[1] Petitioner points out (Pet. 4, 14) that officers of the mortgagee served as trustees under the deed of trust and that the trustees may thus have been subject to a conflict of interests. In *Sheridan* v. *Perpetual Bldg. Ass'n*, 322 F. 2d 418, 420, 116 U.S. App. D.C. 205, 207, the court of appeals wrote:

> "* * * The practice (quite prevalent in the District of Columbia) of having directors, officers or employees of building and loan associations and other lending institutions act as trustees in foreclosure proceedings is subject to suspicion and criticism, as various cases, including this one, demonstrate."

However, petitioner, unlike the plaintiff in *Sheridan*, does not present any breach of trust on the part of the trustees, much less any such breach germane to his claim against the United States.

damages. The contentions which petitioner here advances were presented and found wanting there.[2] Under well established principles of *res judicata*, petitioner is not entitled to litigate the same matters over again. *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591; *Sealfon* v. *United States*, 332 U.S. 575.

Petitioner's assertion that collateral estoppel may be overborne by considerations of public policy (Pet. 15) is not supported by *Kalb* v. *Feuerstein*, 308 U.S. 433, or *United States* v. *United States Fidelity Co.*, 309 U.S. 506, both of which sustained collateral attacks on judgments which were void for lack of jurisdiction. In any event, no such policy considerations suggest that petitioner should be permitted to relitigate its present claim.

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[2] In denying the motion of Duvall Manor, Inc., for a preliminary injunction in C.A. No. 1441-57, the District Court for the District of Columbia wrote:

> The Court therefore concludes as a matter of law that the trustees were fully qualified to act as trustees herein and that the reserve fund aforesaid [for replacements] cannot be used to cure the defaults herein without the consent of the Federal Housing Commissioner first had and obtained and that said Commissioner did not abuse his discretion in failing to allow the fund to be used for these purposes.

CONCLUSION

No warrant for review by this Court appears, and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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